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## FEDERAL CIVIL RIGHTS LEGISLATION AND THE CONSTITUTION

FRANK K. SLOAN \*

Various delaying tactics, including much argument about changes in the United States Senate's rules on debate, would seem to indicate that new Federal Civil Rights legislation will be one of the last items acted upon by this session of the Congress. But it seems certain that some action will be taken to pass new civil rights legislation, particularly with the widespread opinion that civil rights planks contributed much to the Democratic victory in 1948.

Certain it is that the matter may not be disposed of by labeling it "campaign promises". Perhaps the most vocal group of agitators in the nation's recent history are this generation's champions of federal civil rights legislation. This discussion is found as much in recent legal journals and law reviews as it is in other periodicals,<sup>1</sup> and the heated and rather biased approach of much of it is a noteworthy sign that the campaign seems to have made headway even in the traditionally conservative legal profession. Unfortunately, much of this discussion appears to have been guided by ardor for a "cause",<sup>2</sup> rather than by desire for an evaluation of the worth of such legislation.

For this reason, a sober reflection upon the constitutional aspects of federal civil rights legislation seems justified here.

Legislation likely to be considered in the Congress might be listed as (1) Abolition of the poll tax as a prerequisite to voting, (2) a federal fair employment practices act, (3) an anti-lynching act, and (4) an act or acts abolishing segregation of races.

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1. See *Seegert*, Racial Segregation in Educational Institutions, 46 Mich. L. Rev. 639 (1948); *Green*, the Bill of Rights, etc., 46 Mich. L. Rev. 869; *Stark*, Application of 1st Amendment to State Action Through the 14th Amendment, 121 So. Cal. L. Rev. 61; *Fraenkel*, The Federal Civil Rights Laws, 31 Minn. L. Rev. 301 (1947); *Clark*, A Federal Prosecutor Looks at the Civil Rights Statutes, 47 Col. L. Rev. 175 (1947).

2. Negro Disenfranchisement, A Challenge to the Constitution, 47 Col. L. Rev. 76 (1947).

While generally it might seem that all of such acts would be open to the same constitutional questions, it is with the latter two that this article concerns itself principally.

Under Article I, section 4 of the Constitution and the 15th Amendment, the Congress appears to have ample power to pass the anti-poll tax measure, and opposition to the legislation on Constitutional grounds would seem greatly weakened thereby.

The proposed federal fair employment practices act has at least one powerful precedent for Constitutional validity in the decision of the Supreme Court upholding the Fair Labor Standards Act.<sup>3</sup> This decision, however, as well as those on which it was based, relied upon the power of Congress to regulate commerce. The Supreme Court, on fair employment practices legislation, might well evade the knotty civil rights issue by basing the authority for such legislation upon that power.

But the anti-lynching and racial segregation legislation, which would of necessity require federal police enforcement, in procedure if not in fact, face squarely the problem considered here. Are segregation and anti-lynching laws valid under the "privileges and immunities" clause? Does the Congress have the Constitutional power to delineate by legislation what the "due process of law" shall be? Does it have the right to legislate the "equal protection of the laws" which the states must afford, and to enforce those acts by exercise of police power within the states?

Or more briefly, did the 14th Amendment remove from the states, or from the people acting through their states, local control of and local procedural methods for the solution of local police problems?

Despite 76 years of firm denial by the Supreme Court that the 14th Amendment intended any consequence so inimical to the Constitutional theory of local self-government as federal control of the police power, the Court split 5-to-4 in 1947 on the question of including the procedural provisions of the Bill of Rights within the purview of the 14th Amendment.<sup>4</sup> A change of *one* vote in the Court could have opened the door to the Congress to define local procedure for

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3. *United States v. Darby*, 312 U. S. 100 (1941).

4. *Adamson v. People of California*, 332 U. S. 46 (1947).

the States, or at the least to make the Supreme Court the "perpetual censor" of state legislation mentioned in the *Slaughter-House* cases.<sup>5</sup>

As is pointed out in a recent discussion of the *Adamson* case,<sup>6</sup> this fear of making the Supreme Court a perpetual censor on state due processes is not so important in any of these cases as the Court's unwillingness to permit Congress to legislate away our dual form of government. Adherence to the line of the Court's decision in the past 80 years would preserve the underlying concepts of the Constitution as to local control of local government, and prevent the tearing up "by the roots much of the fabric of the law (procedural) in the several states."<sup>7</sup>

The court has consistently followed the rationale of Mr. Justice Cardozo in *Palko v. Connecticut*,<sup>8</sup> that only the *fundamental* rights in the Bill of Rights are secured against state action by the 14th amendment . . . those rights that are "of the very essence of a scheme of ordered liberty," . . . leaving to the states the problem of local procedures. But the upholding of this position by a 5-to-4 margin at this late hour should flash a warning stop-light in the face of those who have implicit faith that local process, and eventually local law, will not one day be written and enforced by the federal government.

While the Court's practice of judicial self-restraint, as well as 80 years of decision on the point are a steep wall for civil-rights advocates to climb, the Court since its revamping in 1937 has consistently upheld federal legislation. Were the Court presented with accomplished federal acts expanding the effect of the 14th amendment into local police matters, the constitutionality of those acts might be upheld. It is the purpose of this article to examine the constitutional reasons why such acts as anti-lynch laws or racial segregation laws might not be valid.

The fifth section of the 14th amendment flatly authorizes the Congress to enforce the amendment by appropriate legis-

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5. 16 Wall. 36 (1872).

6. *Kolher*, Due Process, Purpose and Scope of the 14th Amendment, 21 So. Cal. L. Rev. 47 (1947).

7. Mr. Justice Frankfurter for the majority in *Adamson v. Cal.*, *supra*.

8. 302 U. S. 319 (1937).

lation, therefore the problem turns upon the meaning, the inclusions and the exclusions, of the amendment.

It is submitted that a sober consideration of the decisions of the Supreme Court in all the years before and after the adoption of the 14th amendment, display a conviction that the preservation of local control of local affairs is an indispensable requisite to the continued existence of our democracy.

The Constitution was young when the Court decided that a general power is given to congress to pass all laws necessary and proper to carry into execution powers granted by the Constitution to the government.<sup>9</sup> Yet, while affirming one of those early enabling acts, the Court said:

"We are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States and has never been conceded to the United States."<sup>10</sup>

This limitation on the Congress' power to act was also applied to Congressional attempts to regulate trade within states, as an interference with the police power of states to regulate internal affairs.<sup>11</sup>

The famous *Slaughter-House* cases<sup>12</sup> in 1872 were the first interpretation by the Court of the 13th and 14th amendments, adopted as an aftermath to the Civil War. These cases were the foundation stone for the construction and interpretation of the new amendments, decided within a few years after their adoption. There the Court held that the state of Louisiana had the right under its police power (exercised to protect the public health) to place all slaughtering in the hands of monopoly control, and that the action by the state did not deprive plaintiff butchers of their rights without due process.

The Court declared that the police power was unquestionably in the states before the 13th and 14th amendments and declared that the function of these two amendments was

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9. *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

10. *Prigg v. Pennsylvania*, 16 Pet. 539 (U. S. 1842).

11. *License Cases*, 5 How. 504 (U. S. 1847), followed in *U. S. v. DeWitt*, 9 Wall. 41 (U. S. 1869).

12. 16 Wall. 36 (U. S. 1872).

Sloan: Federal Civil Rights Legislation and the Constitution to liberate and give full citizenship to the Negro race. The Court, through Mr. Justice Miller, pointed out that the first section of the amendment defined for the first time a citizen of the United States, and said "it is only the privileges and immunities of citizens of the United States which are placed under protection of the federal Constitution." He pointed out some of the privileges and immunities of the U. S. citizens: (1) Right to deal with and seek the protection of the U.S. government, (2) Free access to all seaports in all states, (3) Right to use the courts of the several states, (4) Right to care and protection of the U.S. while in foreign jurisdiction or on the high seas, (5) Right to peaceably assemble, (6) Right to petition for redress of grievances, (7) Right to writ of habeas corpus, (8) Right to move on the navigable waters within the U. S., and (9) Right to become a citizen of any state by residing therein.

The Court then said that among the privileges and immunities of *state* citizens were (1) Right to protection by the state government, (2) Right to acquire and possess property, and (3) Right to pursue and obtain happiness. It is clear that this definition leaves the daily pursuits of each state's citizens, in particular their relations with each other, within the purview of state control. The Court said that these rights of state citizens were subject to restraints for the good of the whole, citing *Corfield v. Coryell*,<sup>13</sup> and *Ward v. Maryland*,<sup>14</sup> and that it was not intended that Congress acquire the police power of states as to the rights of their citizens by the adoption of the Civil War amendments.

"Was it the purpose of the 14th amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?"

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13. 4 Wash. C. C. 371 (1823).

14. 8 Wall. 180 (U. S. 1868).

The Court then cited the tremendous power this would give the Congress to restrict and control state legislation and police authority.

“ . . . when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal governments to each other and both of these governments to the people . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.”<sup>15</sup>

Although there was, no doubt, an intention on the part of many Congressmen that such be the purpose, at least to the extent of requiring the states to comply with the complete provisions of the Bill of Rights,<sup>16</sup> the Court was clear that such was not the intention of Congress as a whole, nor of the states.

“But, however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed the existence of the states with power for domestic and local government, including the regulation of civil rights, the rights of person and property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.”<sup>17</sup>

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15. 16 Wall. 36, at p. 78.

16. *Twining v. New Jersey*, 211 U. S. 78 (1908), and the dissent in *Adamson v. California*, *supra*.

17. 16 Wall. 36, at p. 82.

The Court pointed out that the due process and equal protection clauses of the 14th amendment placed the same restrictions on the states as the 5th amendment placed upon the federal government, and that the fifth section of the 14th amendment gave the federal government the power to enforce compliance and halt discrimination by states. But *state* oppression is necessary to invoke the provision, and the Court again said:

"We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

In the years that have followed the *Slaughter-House* decision, the Court and the Congress have found the restraints of the original Civil Rights Statutes,<sup>18</sup> and the power of the Court (to review the acts of states discriminating against citizens, Negro or otherwise) quite sufficient to bring about a gradual and non-violent evolution of social and economic equality for the races, without endangering our system of government by concentration of police power in Washington, and without engendering the strife which accompanies forced social revolutions.

In 1875,<sup>19</sup> the Court reaffirmed the duty of the states to protect the civil rights of their citizens. It was "the very highest duty of the States, when they entered into the Union under the Constitution" to protect all persons in the enjoyment of those "unalienable rights with which they were endowed by their Creator." "Sovereignty, for this purpose, rests alone with the states." The Court stated emphatically that the 14th amendment added nothing to the rights of one citizen against another, and gave the federal government no power to prosecute for crime within a state.

In one of the first actions against a state official<sup>20</sup> the Court pointed out that the action must be *state* action before the 14th amendment became operative, but confirmed the

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18. The Civil Rights Bill, Apr. 6, 1866, 14 Stat. at L. 27; The modified Enforcement Acts, May 31, 1870, 16 Stat. at L. 140; The Civil Rights Act, March 1, 1875, 18 Stat. at L. 3, 336.

19. *U. S. v. Cruikshank*, 92 U. S. 542 (1875).

20. *U. S. v. Reese*, 92 U. S. 214 (1876).



power of the Congress to protect by legislation the rights and immunities created by or dependent upon the Constitution. Further, the Court said that this police power which had not been surrendered by the States "cannot be contracted or bartered away" by them.<sup>21</sup>

In 1879, the functioning of the various Civil Rights acts, and the capability of the Court to interpret the 14th amendment to the full protection of the Negro race was illustrated three times. In *Strauder v. West Virginia*,<sup>22</sup> a state statute barring Negroes from jury duty was held invalid under both state and federal Constitutions, and that section of the Civil Rights Act allowing removal to federal courts where the petitioner cannot secure equal rights in state courts was held valid under the fifth section of the 14th amendment. In *Ex parte Virginia*,<sup>23</sup> the Court pointed out that the State was not discriminating against Negroes where the state statute required all male voters to serve on jury, and the jury list included Negroes, even if the jury actually drawn had no Negroes. On the other hand, in another action in the same state<sup>24</sup> decided at the same time, a Virginia state judge was held properly convicted under the Civil Rights Act<sup>25</sup> for discriminating against Negroes by systematically excluding Negroes from jury lists which he controlled. The Court asserted the overriding power of the 14th amendment as against the State's action in local matters where the action involved discrimination.

It is this ability and willingness of the Court to prevent discrimination that presents the most powerful argument against the proposed Congressional invasion of state police

21. *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877).

22. 100 U. S. 303 (1879).

23. 100 U. S. 313 (1879).

24. *Ex parte Virginia*, 100 U. S. 339 (1879).

25. The sections considered here were part of sections 1977 and 1978 of the Revised Statutes (Acts of Apr. 6, 1866): "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens; and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." Also held valid was section 641 allowing removal of causes, civil or criminal, to U. S. Circuit Courts in cases of discrimination in the state courts.

powers. As the Court said in the same year,<sup>26</sup> the 14th amendment's equal protection clause does not limit the states' power to set up such courts with such jurisdictions as they see fit, so long as all citizens in each jurisdiction are subject to the same rules and laws. Nor does the 14th amendment place the control of local courts and their jurisdiction in the Congress.

Discussing this police power generally, the Court said in 1880<sup>27</sup> that the power extends to all matters affecting the public health, safety and morals, and that the states may exercise *proper* police power, limited only by Constitutional restrictions against impairment of contracts, discrimination, and other prohibited action, citing *Beer Co. v. Massachusetts*, *supra*, and *Patterson v. Kentucky*.<sup>28</sup>

In 1883 the leading cases supplementary to the *Slaughter-House* cases were decided, and those parts of the Civil Rights Acts which prescribed punishment by the Federal government for discrimination by *individuals* (a direct invasion of state police power) were held unconstitutional. In the *Civil Rights* cases, as they are labeled,<sup>29</sup> the Court held that the fifth section of the 14th amendment did not give the Congress power to legislate upon subjects reserved for state protection, but only to provide relief against state action which might be contrary to the provisions of the amendment.

What was the subject on which the Congress had attempted to legislate? Racial segregation<sup>30</sup> . . . the very type of statute the civil-righters urge the Congress to enact today.

The Court, speaking through Mr. Justice Bradley, again pointed out that the 14th amendment applied only to discrimination by state action, and that the Congress may not de-

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26. *Missouri v. Lewis*, 101 U. S. 22 (1879).

27. *Stone v. Mississippi*, 101 U. S. 814 (1880).

28. 97 U. S. 501 (1877).

29. 109 U. S. 3 (1883).

30. Civil Rights Act, March 1, 1875. Sec. 1. "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Sec. 2 provided fines for violations and \$500 redress to the individual deprived of the enumerated rights.

lineate private rights or set up such civil rights statutes as it sees fit to take the place of state statutes:

“Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of state legislatures and to supercede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may, therefore, provide the due process of law for their vindication in every case; and that, because the denial by a state to any person of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizens, but corrective legislation . . . for counteracting such laws as the states may adopt or enforce . . .”

The court then pointed out that such “corrective” sections of the Civil Rights Act as those approved in *Strauder v. W. Va.*, and *Ex Parte Virginia*, *supra*, were valid for the reason that they reflected the true purpose of the 14th amendment, to protect against abuse by state action.

The dissent by Mr. Justice Harlan, was an able and vigorous one.<sup>31</sup> It followed the theory that the Constitutional provision should be pursued liberally so as to permit the Congress to give the fullest effect to the 14th amendment. This theory combined with the view of Mr. Justice Black in the *Adamson* case in 1947 (that the original *intent* was that the amendment include all guarantees of the Bill of Rights—procedural and substantive—within Congressional control) is the theory still relied upon by those now urging further Congressional action.<sup>32</sup>

31. 109 U. S. 3, p. 16; 3 S. Ct. 18, p. 33.

32. *Fraenkel*, The Federal Civil Rights Laws, 31 Minn. L. Rev. 301 (1947).

The Court's strong re-affirmation of the decision in the *Slaughter-House* cases, has been followed by an unbroken line of decision to the present day, holding the position firm.

In the same year,<sup>33</sup> the Court restated the position that the accused may not demand a jury composed wholly or partly of his race, but only that they be properly included in jury lists and not excluded by state law or action of state agents.

The next year<sup>34</sup> the Court upheld the power of the states to pass burdensome police regulations, if they were necessary and proper and applied to all persons in the same class equally:

"But neither the amendment (14th)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."<sup>35</sup>

430 (1890).

In 1865 the Court held that the Constitutional prohibition against State impairment of the obligation of contracts<sup>36</sup> does not prevent full exercise of the police power by the states, even though contracts are affected by police regulation.<sup>37</sup>

In 1891 the Court declared<sup>38</sup> "it must be regarded as settled" that by the 14th amendment the powers of the states are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law. Further, that law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state the Constitutional requirement is satisfied; and that due process, is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unre-

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33. *Bush v. Kentucky*, 107 U. S. 110, 1 S. Ct. 625 (1883).

34. *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357 (1884).

35. Quoted with approval, *in re Kemmler*, 136 U. S. 436, 10 S. Ct.

36. Const., Art. I, Sec. 10.

37. *New Orleans Gas Light Co. v. La. Light Co.*, 115 U. S. 650, 6 S. Ct. 252 (1885).

38. *Leeper v. Texas*, 139 U. S. 462, 11 S. Ct. 577 (1891).

strained by the “established principles of private right and distributive justice,” citing *Hurtado v. California*.<sup>39</sup>

Again in 1891 the rules of the *Slaughter-House* and *Civil Rights* cases were cited and reaffirmed.<sup>40</sup>

In 1894 the Court pointed out in sharp language that the 14th amendment cannot be availed of by “every unsuccessful litigant in the State court,” but redress from valid yet burdensome state laws must be had from the legislature.<sup>41</sup> The Court approved Chief Justice Taney’s broad definition of the state police powers in the *License* cases,<sup>42</sup> and announced an equally broad definition.<sup>43</sup>

On the other hand where there was actual infringement of the 14th amendment’s protections, the Court stated flatly that the prohibition extended to *any* authority or person acting under authority of the State, refusing to allow the party guilty of discrimination to escape on the technical ground of his scope of authority.<sup>44</sup>

In 1905: Protection of the health and safety of the people is the *reserved* power of the States, “there can be no doubt.”<sup>45</sup>

It was not until 1908 that the novel Bill of Rights approach to the inclusions of the 14th amendment was considered in detail.<sup>46</sup> Twining had been convicted of fraud in a bank examination proceeding, and the Judge in his charge commented upon the defendant’s failure to take the stand and deny the charges against him, which is a practice permitted in New Jersey. On appeal to the Supreme Court Twining asserted that his immunity from self-incrimination had been invaded by the state, for it was a “privilege or immunity” guaranteed to him by the 14th amendment as a citizen of the United States, on the theory that the first eight amendments (the 5th involves the privilege against self-incrimination) were made applicable to the states by the 14th amendment.

Mr. Justice Moody announced the opinion, which the majority followed in the *Adamson* case last year, and which

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39. 110 U. S. 516, 4 S. Ct. 111 (1884).

40. *Wilkerson v. Rahrer*, 140 U. S. 545, 11 S. Ct. 865 (1891).

41. *Rwy. Co. v. Bristol*, 151 U. S. 556, 14 S. Ct. 437 (1894).

42. 5 How. 504, 583 (1847).

43. *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 449 (1894).

44. *Rwy. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581 (1897).

45. *Lieberman v. Van deCarr*, 199 U. S. 552, 26 S. Ct. 144 (1905).

46. *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14 (1908).

was followed by Mr. Justice Cardozo speaking for the majority in *Palko v. Connecticut*, in 1937.<sup>47</sup> Justice Moody said:

"The 14th Amendment withdrew from the states powers theretofore enjoyed by them to an extent not fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relations to its people and to the Union."

He then pointed out that the 14th amendment "did not forbid the states to abridge the personal rights enumerated in the first eight amendments," many of which are procedural, and many of which would be unnecessary limitations on State sovereignty, whereas these amendments were most proper limitations on the *central federal* government.

Then the rule, which Mr. Justice Black styles the "natural law" rule of interpretation of the 14th amendment, was set out. It is, briefly, if the Court under the 14th amendment forbids a state to infringe personal liberties guaranteed as against the federal government by the Bill of Rights, it will do so *not* "because these rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law", that their abridgement would be a violation of the amendment.

The desire of the majority in the *Twining* and *Palko* decisions was the same as that of the majority in the *Adamson* decision, speaking through Mr. Justice Frankfurter: (1) Not to infringe upon the rights of the states in the exercise of their police powers by pressing upon them the specific requirements of the first eight amendments, and (2) To leave to the Court to determine in each class of case what the

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47. 302 U. S. 319, 58 S. Ct. 149 (1937).

privileges and immunities of a United States citizen are, and whether they have been abridged by state action.<sup>48</sup>

The efficacy of this position both to maintain the long-established interpretation of the amendment under the *Slaughter-House* and *Civil Rights* cases, and at the same time to allow a full check by the Court on infringement of civil rights by state action is self-evident. In fact, it would seem to pose a complete answer to the civil-righter who desires willy-nilly to legislate social reform without a thought for Constitutional consequences.

The cases discussed cover, generally, the problem of the scope of the 14th amendment as relates to civil rights, and the legislative power of the Congress in that field. The established doctrines of the Court in the problem have been set out. The proper consideration of the question merits a hurried glance at other decisions of the Court since the *Twining* case up to the present, however.

In 1916, in the *Blue Sky* cases,<sup>49</sup> the Court held that the States are free to act even in the field of interstate commerce (until such time as the Congress acts under its power), and that it is clearly within the police power of the States to determine what is best in the matter of regulations to promote economic security.

In 1923 the Court declared that citizens and aliens alike are protected by the 14th amendment from "arbitrary and capricious" state action as concerns their property rights, but that the amendment did not take away state police powers . . . "and in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people."<sup>50</sup>

That the Court has continued steadfastly to uphold the rights of minorities where discrimination fell within the purview of the 14th amendment was shown again in 1927. In

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48. See generally on this point, *Greenbacker*, The 14th Amendment, Challenged, 36 Geotwn. L. Rev. 398 (1948); and *Hutchinson*, Due Process and the Bill of Rights—Self-Incrimination, 46 Mich. L. Rev. 372 (1948).

49. *Hall v. Geiger-Jones Co. (Etc.)*, 242 U. S. 599, 37 S. Ct. 217 (1916).

50. Cited with approval in *Lacoste v. Department of Conservation*, 263 U. S. 545, 44 S. Ct. 186 (1924).

*Nixon v. Herndon*,<sup>51</sup> the Court reversed a dismissal by the District court where a Negro brought an action (under the Civil Rights statutes conferring jurisdiction on the District court) for damages against Texas election officials who had denied him the right to vote in primary elections. Mr. Justice Holmes said the amendment declares: "that the law in the States shall be the same for the black as for the white," and the Texas statute barring Negroes from the vote in Democratic party primaries was invalid, citing *Buchanan v. Warley*,<sup>52</sup> and *Vick Co. v. Hopkins*.<sup>53</sup>

In 1927<sup>54</sup> and in 1928<sup>55</sup> the Court again asserted that the states are free to pass proper regulatory laws, even though burdensome on one class of citizens, so long as they rest on a reasonable basis and are not arbitrary. As was said in the *Liggett* case:

"The police power may be executed in the form of state legislation when *otherwise* the effect may be to invade rights guaranteed by the 14th amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."

See especially the highly readable concurring opinion of Mr. Justice Brandeis in the *Whitney* case, discussing the civil rights afforded protection by the 14th amendment (and this without the addition of federal police legislation). It was also pointed out in the *Liggett* case that the party discriminated against may enjoin the action of the state. No more speedy remedy could be devised in a dozen new federal civil rights acts.

It was not until the impact of the social conflict of the 1930's and the armed conflict of the 1940's that the Court was called upon again to deal with a rising tide of civil rights cases. Indeed the current flux of civil rights litigation and agitation is but a reflection of the unsettled times. The problem is more pressing today than at any time since the years

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51. 273 U. S. 536, 47 S. Ct. 446 (1927).

52. 245 U. S. 60, 38 S. Ct. 16 (1917).

53. 118 U. S. 356, 6 S. Ct. 1064 (1886).

54. *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641 (1927).

55. *Liggett Co. v. Baldridge*, 278 U. S. 105, 49 S. Ct. 57 (1928).



following the Civil War, and the fact that the older doctrines are weathering the storm (even if by 5-to-4 decision) is a powerful argument for their validity and against attempting to "expand" the amendment by legislation.

In 1939 the Court announced a strong decision upholding the right to freedom of speech and assembly as against state invasion in *Mayor Hague v. C. I. O.*<sup>56</sup> The obvious infringement on civil rights perpetrated by the New Jersey Mayor's intimidation and ejection of labor organizers from "his" city was sternly censured by the Court. The Court declared that the rights of United States citizens under the 14th amendment are now ascendant to the secondary rights of state citizenship, and that rights to free speech and freedom of assembly are secured to citizens, by the "privileges and immunities" clause of the 14th amendment. Mr. Justice Butler, speaking for the Court, went into some detail of the discussion of the federal Civil Rights acts as they now stand<sup>57</sup> and determined that the C. I. O. suit to enjoin the activities of Mayor Hague was properly brought.

Mr. Justice Stone in a separate opinion stated that he was unable to agree that the freedoms of speech and assembly were protected as against state action under the privileges and immunities clause, which would require a broader interpretation of the amendment than the settled decisions justify (and would imply Congressional and judicial control over the states in respect to protecting those rights.)<sup>58</sup> He preferred to stand by the settled (and sounder it seems) position that the relief was provided to the complainants because they were denied

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56. 307 U. S. 496, 59 S. Ct. 954 (1939).

57. *Civil* Redress for Deprivation of Civil Rights, or for conspiracy to deprive persons of those rights is made available to the injured party by statute: 8 USCA 43, 47. *Criminal* Redress for Deprivation of Civil Rights or for conspiracy to deprive persons of those rights (including intimidation at the polls) is provided by statute: 18 USCA 51, *et seq.*

*Jurisdiction* of Civil Rights cases is conferred upon the District Court (both criminal and civil, at law and in equity) by statute; 28 USCA 41 (12, 13, 14).

These statutes are largely unchanged from the original acts (see Note 18 *supra*) and have served since 1866 to protect the civil rights of those under protection of the United States without destroying the harmony of our dual form of government.

58. See Justice Stone's summary of the problem in the footnotes to his separate opinion, 307 U. S. at pp. 519, 520, 59 S. Ct. at p. 966.

the protections required by the "due process" and "equal protection" clauses of the amendment, without enlarging the privileges and immunities clause.

Also in 1939 the Court set the pattern that was to follow in the many war-born "Jehovah's Witness" cases by declaring:<sup>59</sup>

"Although a municipality may enact regulations in the interest of the public health, safety, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."

Then the "liberal" Court displayed that the proper exercise of police power by states is still free from interference under the doctrines established by the years. Upholding the validity of a Virginia regulatory statute,<sup>60</sup> the Court declared, "It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders . . ."

In 1941, the Court denied a California court the power to jail for contempt for criticism of the court's opinion or holding (which did not actually interfere with trial of the case). The court said that under the police power, a state may justify suppression even of free speech which is protected by the 14th amendment, but " . . . there must be reasonable ground to fear that serious evil will result if free speech is practiced, and there must be reasonable ground to believe that the danger apprehended is imminent."<sup>61</sup>

In 1946, in another of the Jehovah's Witness cases,<sup>62</sup> the Court declared that the rights of free speech, press and assembly guaranteed as against the federal government by the 1st amendment were extended as against state infringement by the 14th. It is interesting to note here that the state "agent" was a mining company which owned and ran the town with state approval, yet the amendment's protection was extended.

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59. *Schneider v. New Jersey*, 308 U. S. 147 (1939).

60. *Ozborn v. Ozlin*, 310 U. S. 53, 60 S. Ct. 758 (1940).

61. *Bridges v. California*, 314 U. S. 252, 62 S. Ct. 190 (1941). See also *Sellers v. Johnson*, CCA 8, 163 F (2d) 877 (1947).

62. *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276 (1946).

A further illustration of the adaptability of the 14th amendment to the changing scene is found in the *Catholic School Bus* case decided in 1947.<sup>63</sup> Although the chief issue was separation of state and church under the Constitution, both majority opinion and dissent found no problem in applying the prohibitions concerning religion in the 1st amendment to the States by way of the 14th amendment. Clearly this accepted absorption has come by way of the "fundamental" inclusions doctrine of *Twining v. New Jersey* and *Palko v. Connecticut*, *supra*.

The *Adamson* decision, *supra*, was also decided recently, bringing into sharp focus again the problem of the scope of the 14th amendment at a time when the clamor is high to broaden its scope by federal legislation, if not by Court decision.

The practice of a state (California) under a statute again (as in the *Twining* and *Palko* cases) allowed a comment on the accused's failure to testify and allowed evidence to be brought in of previous convictions, concededly improper in federal jurisdictions under the 5th amendment. The Court again decided that the "privileges and immunities" of United States citizens were those fundamental freedoms necessary to life, liberty and the pursuit of happiness, refusing to accede to the argument that all the provisions of the Bill of Rights must be included in those rights protected by the 14th amendment. Mr. Justice Frankfurter pointed out that, as in the past, the "due process" requirements would protect the citizen from improper state action, and would guarantee a fair trial, without the danger accompanying an enlargement of the scope of the 14th amendment. He declared: <sup>64</sup>

"Between the incorporation of the 14th Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges only one, who may respectfully be called an eccentric exception, ever indicated the belief that the 14th Amendment was a shorthand summary of the first eight amendments theretofore limiting only the Federal

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63. *Everson v. Board of Education*, 330 U. S. 1, 67 S. Ct. 504 (1947).

64. 332 U. S. 46, at p. 62, 67 S. Ct. 1672, at p. 1680.

Government, and that due process incorporated those eight amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthew, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the 14th Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are 'narrow or provincial' would deem essential to 'a fair and enlightened system of justice'."

Although the array of cases set out here, many of them involving technical points of no seeming relation to the issue discussed, may seem a haphazard selection, it is submitted that they present an accurate summary of the development of the nation's civil rights law in the 80 years since the Civil War.

Through them all runs a strong thread of determination that this nation shall grow in human liberties and social progress, and that the rights of minorities shall be firmly maintained. Interwoven with that thread is an equal determination that our democratic dual system of government shall not be sacrificed to satisfy a desire for legislated social progress.

Mr. Justice Strong said in *Strauder v. West Virginia*, *supra*:

"The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had

left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations that the 14th Amendment was adopted . . . and enforced by legislation.”

The decisions of the Court swiftly marked out the boundaries of that protection. Cutting out the invalid segregation and police power provisions of the acts, it gave the oppressed Negro (as well as all other minorities) the maximum of protection and aid without a destruction of our governmental system with its protection against centralized tyranny. No other race in the world's history has attained the astonishing progress in the short span of 80 years that has attended the Negro race under our law. That minority groups in America are respected and protected as nowhere else on the globe is axiomatic. To endanger our sound governmental system and call down upon our heads the strife of enforced social revolution, by federal legislation, would seem an ill-advised solution to those problems of minority protection which time and the courts seem fully capable of solving.

As Mr. Justice Bradley declared in the *Civil Rights* cases, *supra*:

“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.”

It is submitted that the lesson of these cogent words has long been drowned in the torrent of agitation for civil rights legislation. The public generally seem to have become so “sold” on the proposition that the nation requires more civil rights legislation—any type, just so it is labeled civil rights—that they forget the great danger that they will thereby sacrifice their own rights.

It is not insignificant that those loudest in the demand for legislation extending the Congressional power over the

states, are often found to be identified with groups whose desire to assume control of our government would be greatly facilitated by a centralization of the police power in one place. If these words seem melodramatic look again at the words of the Court set out above, always insisting that the Constitutional system be preserved at all hazards.

The conclusion seems inescapable that the nation's present system of civil rights law, built by constitutional amendment, statute and decision, is fitting and efficient to promote the progress of minorities in our society with a minimum of strife and with safety to our priceless dual form of constitutional government.